

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

CASE NO. 2:17-cr-20739

2:20-cv-12514

v.

HONORABLE DENISE PAGE HOOD

LENARD DARNELL SMITH,

Defendant.

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**ORDER DENYING DEFENDANT’S MOTION UNDER
28 U.S.C. § 2255 [#29] and DISMISSING WITH
PREJUDICE CIVIL CASE NO. 20-12514**

I. Introduction

On February 27, 2018, Defendant pleaded guilty to Counts 1 (Possession of a Firearm in Furtherance of a Drug Trafficking Crime) and Count Five (Possession with Intent to Distribute Cocaine Base) of the Indictment. [ECF No. 17] The undersigned imposed a sentence of 60 months for Count 1 and 12 months and a day for Count 5, to be served consecutively. [ECF No. 23] Defendant waived his right to appeal, and he did not otherwise file an appeal of his plea and conviction.

On September 2, 2020, Defendant filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (the “2255 Motion”). [ECF No. 29] The Government filed a response on November 9, 2020. [ECF No. 33] Defendant did not file a reply.

II. Legal Standard

28 U.S.C. § 2255 authorizes a federal prisoner to move the district court to vacate a sentence. 28 U.S.C. § 2255(a). A defendant seeking relief under § 2255 “must allege as a basis for relief: (1) an error of constitutional magnitude; (2) a sentence imposed outside statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.” *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006) (citing *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003)). When raising claims alleging errors of constitutional magnitude, a defendant must show that the constitutional error had a substantial and injurious effect or influence on the proceedings. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999). Further, relief under § 2255 requires a showing of “a fundamental defect which inherently results in a complete miscarriage of justice.” *Davis v. U. S.*, 417 U.S. 333, 346 (1974).

III. Analysis

Defendant’s sole claim is that his conviction under 18 U.S.C. § 924(c) violates his constitutional rights because, as the United States Supreme Court recently decided in *United States v. Davis*, 139 S.Ct. 2319 (2019), Section 924(c) is unconstitutionally vague. Defendant argues that the sale of drugs is not a crime

of violence, and he did not use a firearm or engage in a crime of violence when selling narcotics. For the reasons that follow, Defendant's claim fails.

In *Davis*, the Supreme Court invalidated the "residual clause" in Section 924(c)'s definition of a "crime of violence." *Davis*, 139 S.Ct. at 2326-27. Section 924(c) authorizes heightened criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). According to Section 924(c)(3), a crime of violence is "an offense that is a felony" and "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

The Court understands the Supreme Court's ruling in *Davis* – but also notes that the Supreme Court's ruling in *Davis* pertained only to the vagueness of the residual clause with respect to the definition of a federal "crime of violence" in Section 924(c)(3). *Davis* did not address any aspect of the definition of a drug trafficking crime, which is found in Section 924(c)(2) and includes "any felony punishable under the Controlled Substances Act (21 U.S.C. 801, *et seq.*)." Other courts have rejected any attempt to extend the residual clause deficiency in the

“crime of violence” provision to the “drug trafficking crime” provision. *See, e.g., United States v. Reid*, No. 0:04-353, 2018 WL 2336120, at *2 (D.S.C. Feb. 6, 2018) (“The drug trafficking portion of § 924(c)(2) does not have a residual clause, and states with particularity which charges serve as underlying crimes for a § 924(c) conviction. Therefore, the Supreme Court’s holding in *Johnson* has no effect on convictions for § 924(c) based on drug trafficking crimes.”); *see also United States v. Chapman*, 851 F.3d 363, 374–75 (5th Cir. 2017) (finding defendant’s § 924(c) convictions not affected “by any alleged infirmity in the risk of force definition of crime of violence” because the predicate offenses were “based on having committed drug trafficking crimes”); *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019) (defendant’s “§924(c) conviction is fully supported by his drug-trafficking crimes, and it therefore is outside the scope of *Davis*, which invalidated only § 924(c)(3)(B)’s residual clause relating to crimes of violence.”); *In re Cannon*, 931 F.3d 1236, 1242 (11th Cir. 2019) (rejecting post-*Davis* challenge to § 924(c) conviction predicated on possession with intent to distribute cocaine and marijuana charge). *See also United States v. Simms*, 914 F.3d 229, 252 (4th Cir. 2019) (en banc) (finding residual clause in § 924(c)(3)(B) vague before *Davis*, but explaining that “[i]n

striking it down, we leave intact . . . the entirety of the definition of ‘drug trafficking crime’ in § 924(c)’’).

Count 1 of the Indictment alleges only that Defendant “knowingly possessed a firearm, that is, one Smith and Wesson SD9 9mm caliber pistol, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States; specifically, the drug trafficking crime alleged in Count Five of this Indictment, all in violation of Title 18, United States Code, Section 924(c)(1)(A).” ECF No. 9, PageID.18-19. This charge is unequivocally a charge of the crime of drug trafficking and does not charge Defendant with a crime of violence. As the case law cited above demonstrates, *Davis* applies only to convictions pursuant to Section 924(c)(3) and does not apply to convictions for a drug trafficking crime pursuant to Section 924(c)(2). Accordingly, the Court must deny Defendant’s 2255 Motion.

IV. Conclusion

Accordingly, for the reasons set forth above,

IT IS ORDERED that Defendant’s Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 [Dkt. No. 29] is **DENIED**.

IT IS FURTHER ORDERED that Civil Case No. 20-12514 (the Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255) is **DISMISSED WITH PREJUDICE and designated as CLOSED.**

IT IS ORDERED.

s/Denise Page Hood

DENISE PAGE HOOD

United States District Judge

DATED: March 18, 2021